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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

July 19, 1996

By Hand

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: CS Docket No. 96-133

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and four (4) copies of Comments filed in response to the Notice of Inquiry in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner  
Charles R. Milkis  
Counsel for CellularVision USA, Inc.

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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JUL 19 1996

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In the Matter of )

Annual Assessment of the Status of )  
Competition in the Market for the )  
Delivery of Video Programming )  
\_\_\_\_\_ )

CS Docket No. 96-133

**COMMENTS**

CellularVision USA, Inc.<sup>1</sup> ("CellularVision"), by its attorneys, hereby files Comments in response to the Notice of Inquiry ("NOI") in the above-referenced proceeding seeking information relevant to the Commission's annual report to Congress on the status of competition in the video programming delivery marketplace.

CellularVision is the recognized pioneer of Local Multipoint Distribution Service ("LMDS"),<sup>2</sup> a revolutionary new wireless interactive video, voice and data service poised for nationwide deployment in the 28 GHz band. Importantly, the LMDS industry, led by CellularVision, has made significant progress during the past year

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<sup>1</sup> CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

<sup>2</sup> The Commission twice has tentatively awarded CellularVision a pioneer's preference for its role as the innovator of LMDS. See Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, CC Docket No. 92-297, 8 FCC Rcd 557 (1993), paras. 57-65; Third Notice of Proposed Rulemaking and Supplemental Tentative Decision ("Third NPRM"), CC Docket No. 92-297, FCC 95-287, para. 70 (released July 28, 1995).

since the Commission's last report to Congress – progress reflected by Wall Street's support of CellularVision's public offering in February 1996, and the Commission's adoption of a final 28 GHz band plan on July 18, 1996, allocating a total of 1 GHz to LMDS.

**I. Changes in Markets for the Delivery of Video Programming Since Last Year's Report**

**A. Developments Regarding LMDS**

On July 18, 1996, the Commission made substantial progress towards the nationwide licensing of LMDS through spectrum auctions with the adoption of a Report and Order and Fourth Notice of Proposed Rulemaking setting forth a comprehensive plan that segments the 2.5 GHz from 27.5-30.0 GHz among LMDS, MSS and Fixed Satellite Service. Specifically, the final band plan allocates to LMDS 850 MHz primary from 27.5-28.35 GHz, and 150 MHz co-primary with Mobile Satellite Service ("MSS") from 29.1-29.25 GHz.<sup>3</sup> In the fast-track Fourth Notice of Proposed Rulemaking ("Fourth NPRM") portion of the decision, the Commission has proposed to allocate 300 MHz in the 31.0-31.3 GHz band for LMDS in an effort to compensate for the encumbered nature of the 150 MHz LMDS is to share with MSS.<sup>4</sup> The Commission also seeks additional comment on whether local exchange carriers

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<sup>3</sup> See News Release, "FCC Adopts Final Band Plan For The 28 GHz Frequency Band (CC Docket No. 92-297)," Report No. DC 96-65 (released July 18, 1996).

<sup>4</sup> Id.

and cable operators should be permitted to hold LMDS licenses in their service areas.

While CellularVision applauds the Commission for its resolution of the band plan portion of the protracted 28 GHz LMDS Rulemaking proceeding, CellularVision believes that it is vital for the Commission to promptly conclude the Fourth NPRM in expedited fashion, and to auction before the end of 1996 LMDS licenses comprised of 850/150 MHz in the 28 GHz band together with the 300 MHz in the 31 GHz band. In addition to the clear public interest benefits to be provided to consumers by the nationwide deployment of this competitive new interactive video, voice and data service, LMDS license auctions are expected to generate billions in Federal deficit-reducing dollars this year.

**B. Progress Achieved by CellularVision, the Pioneer of LMDS and the Only Commercially Licensed LMDS Provider**

With regard to CellularVision, there have been numerous important developments during the past year that have enhanced CellularVision's ability to provide its high quality, low cost video alternative to consumers in the New York Primary Metropolitan Statistical Area ("PMSA"). First, CellularVision completed a successful public stock offering and now is publicly traded on the NASDAQ National Market under the symbol "CVUS." As a result, CellularVision is the first publicly traded LMDS company. Also, CellularVision's subsidiary, CellularVision of New York, L.P., which holds a commercial license to use the 27.5-28.5 GHz band to provide

LMDS video service throughout the New York Primary Metropolitan Statistical Area,<sup>5</sup> is aggressively building out its system throughout the New York PMSA pursuant to Commission authorization granted in December 1995.<sup>6</sup> CellularVision's LMDS system, which currently passes approximately 900,000 households in its service area, provides consumers with a 49-channel alternative to cable television at a lower cost than its franchised cable competitors.

In recognition of CellularVision's commitment to the deployment of its system throughout the New York PMSA pursuant to its commercial license, in the Report and Order adopted on July 18, 1996, the Commission notes that it expects to process CellularVision's pending application for renewal of its license once it has adopted service rules for LMDS. Further, as the recognized leader in this important emerging industry, the Commission twice has tentatively awarded CellularVision a pioneer's preference for its role as the innovator of LMDS, and thus, has proposed to award CellularVision that portion of the New York BTA not already covered by CellularVision's existing license for the New York PMSA, with CellularVision paying 85% of the equivalent auction value of that portion of the New York BTA.<sup>7</sup>

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<sup>5</sup> See Hye Crest Management, Inc., 6 FCC Rcd 332 (1991).

<sup>6</sup> See In re Applications of CELLULARVISION, INC. For authorization to increase the number of hub transmitters within the New York Primary Metropolitan Statistical Area, DA 95-2429 (released December 7, 1995) (granting CellularVision's applications for 34 new transmitter sites)

<sup>7</sup> See note 2 supra; Third NPRM, para. 70

## **II. Relevance of Certain Provisions of the Telecommunications Act of 1996**

As the Commission notes in the NQI, the Telecommunications Act of 1996 ("Telecom Act") contains "several provisions that may promote competition among multichannel video programming distributors ("MVPDs"), by fostering the entry of alternative MVPDs in markets for the delivery of video programming and by removing existing barriers to entry."<sup>8</sup> To the extent that LMDS is utilized by a licensee as a video delivery system, LMDS will represent a new MVPD that will be seeking to compete in the post-Telecom Act's open marketplace against traditional cable systems, wireless cable systems, satellite systems and telephone companies. In view of the clear intent of Congress that these provisions of the Telecom Act seek to level the playing field between these various competing services, LMDS must be treated similarly if Congress' explicit intent is to be achieved as this important new service is licensed nationwide through spectrum auctions, hopefully later this year.

In particular, Section 207 of the Telecom Act prohibits "restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."<sup>9</sup> While Section 207 did not specifically mention LMDS – presumably because the Commission had not yet formally adopted rules for LMDS at the time of the Telecom Act's passage – the same

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<sup>8</sup> NQI, para. 5.

<sup>9</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996).

public policy reasons that prompted Congress to mandate such protections for the reception of broadcast, MMDS and DBS services, which currently are licensed nationwide by the Commission, apply equally to LMDS, also a wireless competitor in the video marketplace.

As in the NQI, the Commission noted in its Notice of Proposed Rulemaking implementing Section 207 that the FCC "is promoting two complimentary federal interests: (a) to ensure that consumers have access to a broad range of video programming services; and (b) to foster full and fair competition among different types of video programming services."<sup>10</sup> Clearly, these federal interests apply to LMDS, and the failure to apply these protections to LMDS could provide a substantial competitive advantage to over-the-air broadcast, MMDS and DBS. Accordingly, CellularVision has argued in filings both in the 28 GHz LMDS Rulemaking proceeding and in the proceeding implementing Section 207 that the Commission should preempt state or local governmental and non-governmental restrictions that impair a viewer's ability to receive video programming with LMDS.<sup>11</sup>

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<sup>10</sup> See Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, CS Docket No. 96-83, FCC 96-151, para.2 (released April 4, 1996); NQI, para. 10.

<sup>11</sup> See Letter to Michele Farquhar from Michael R. Gardner, dated April 4, 1994, CC Docket No. 92-297, pp. 3-4; Comments of CellularVision USA, Inc., CS Docket No. 96-83, May 6, 1996; Reply Comments of CellularVision, CS Docket 96-83, May 21, 1996. Moreover, since LMDS has two-way capabilities, CellularVision has argued that the federal preemption of state or local governmental and non-governmental restrictions on both subscriber receive antennas and subscriber transmit antennas is warranted. Id.

Likewise, the Commission also should explicitly recognize the applicability of Section 704 of the Telecom Act, regarding the siting of facilities and radio frequency emission standards, to LMDS.<sup>12</sup> Specifically, Section 704 provides a mechanism for expedited judicial relief from state or local governmental zoning restrictions or decisions that unreasonably prohibit the placement, construction or modification of a wireless service provider's facilities, or discriminate against competing providers. Section 704 also establishes a Commission process to preempt local zoning denials based on claims of radio frequency emission levels for facilities that comply with standards defined by the Commission. As CellularVision has argued in filings in both the 28 GHz LMDS Rulemaking proceeding and in the proceeding implementing Section 207, since LMDS is a multi-faceted wireless service, the Commission should afford LMDS licensees the protections of Section 704, which are vital to ensuring that LMDS transmit facilities, like those of its wireless competitors, can be deployed expeditiously, unimpeded by any unreasonable state or local zoning prohibitions.<sup>13</sup>

### **III. Conclusion**

Based on Wall Street's enthusiastic support for LMDS as evidenced by CellularVision's successful public offering in February 1996, and in view of the FCC's

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<sup>12</sup> See Telecom Act, 110 Stat. at 151-152.

<sup>13</sup> See Letter to Michele Farquhar from Michael R. Gardner, dated April 4, 1994, CC Docket No. 92-297, p. 4; Comments of CellularVision USA, Inc., CS Docket No. 96-83, May 6, 1996; Reply Comments of CellularVision, CS Docket 96-83, May 21, 1996.



actions on July 18, 1996 allocating 1 GHz for LMDS while also seeking in the Fourth NPRM to obtain additional spectrum for LMDS, it is now abundantly evident that LMDS is a proven competitive video, voice and data service that should be licensed nationwide in the near term – certainly before the Commission files its next report to Congress on the status of the video programming delivery marketplace. The only thing that could prevent realizing this important competitive goal would be delay in the Commission's prompt conclusion of the Fourth NPRM and the adoption of LMDS service and auction rules, which are necessary predicates to the auctioning of LMDS licenses in 493 BTAs throughout the United States. In view of the enormous public interest benefits attendant to the prompt nationwide licensing of LMDS,<sup>14</sup> CellularVision urges the Commission to appropriately recognize in its next report to

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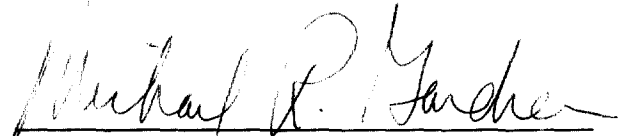
<sup>14</sup> The numerous immediate public interest benefits of the nationwide deployment of LMDS are well stated in the voluminous record in the 28 GHz LMDS Rulemaking proceeding. Those benefits include (1) providing consumers with an immediate, high quality competitive choice in video, telephony and data services; (2) offering educational institutions like the pro-LMDS University of Texas-Pan American with an affordable means for effectuating distance learning goals; (3) providing small businesses the real opportunity to participate in today's communications marketplace explosion through the ownership and/or operation of LMDS systems, a possibility noted repeatedly in the record in the 28 GHz LMDS Rulemaking proceeding by the Clinton Administration's Small Business Administration; (4) creating major equipment markets for resilient defense contractors like Titan Information Systems and M/A-Com, Inc., as well as for small business starts-ups like mm-Tech, Inc., who have invested significant resources to develop and supply LMDS equipment both in the U.S. and to the burgeoning global market; and (5) generating billions of deficit reducing dollars for the Federal Treasury from the nationwide auctioning of LMDS licenses.

Congress the promise of LMDS as a significant new competitor in the video delivery marketplace.

Respectfully submitted,

CELLULARVISION USA, INC.

By:

A handwritten signature in cursive script, appearing to read "Michael R. Gardner", written over a horizontal line.

Michael R. Gardner  
Charles R. Milkis  
William J. Gildea III

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Its Attorneys

July 19, 1996

Certificate of Service


I, Ryan J. McCumber, hereby certify that copies of the foregoing "Comments" were delivered by hand, on July 19, 1996, to the following:

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